No. 10,501

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY DICKINSON (his wife), WILLIAM KEMP, and L. K. FEREVA, individually and doing business under the firm name and style of "Fereva Chevrolet Company",

Appellants,

vs.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD.,

Appellee.

REPLY BRIEF FOR APPELLANTS DICKINSON.

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FOREWORD.

The headings herein correspond to those adopted in the opening brief.

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1. THE DEFENDANTS DICKINSON WERE DENIED THE RIGHT OF TRIAL BY JURY. (Op. Bf. p. 11.)

These appellants pointed out in their opening brief (pp. 11-17) that they were entitled to a jury trial as a matter of right; that they duly demanded a jury trial and a jury returned a verdict in their favor; and that

the trial court erred in rejecting the verdict as merely advisory and making and entering findings and judgment contrary thereto.

The first contention of appellee in answer to the point is that "This cause is within equity jurisdiction and court properly held verdicts advisory". (Bf. App. p. 2.) The contention is not sound. It is opposed to the decision of this court in *Pacific Indem. Co. v. McDonald,* C.C.A.Or. 1939, 107 F. 2d 446, cited by appellants at pages 12 and 16 of their brief as decisive on the question. Although the brief for appellee cites 116 cases no reference to the *McDonald* case is therein contained.

The law is now thoroughly settled that an action for declaratory relief "is neither legal nor equitable but is sui generis".

Pacific Indem. Co. v. McDonald, C.C.A.Or. 1939, 107 F. 2d 446, 448;

United States F. & G. Co. v. Koch, C.C.A.Pa. 1939, 102 F. 2d 288, 290;

Great Northern Life Ins. Co. v. Vince, C.C.A. Mich. 1941, 118 F. 2d 232, 233-4;

Hargrove v. American Cent. Ins. Co., C.C.A. Okl. 1942, 125 F. 2d 225, 228;

Home Ins. Co. of New York v. Trotter, C.C.A. Mo. 1942, 130 F. 2d 800, 802-3.

In *Home Ins. Co. of New York v. Trotter,* C.C.A. Mo. 1942, 130 F. 2d 800, it was said, at page 802:

> "The proceeding was not, as appellants now assert, a suit to invoke the equitable jurisdiction of the court but, on the other hand, was a typical pro-

ceeding for a declaratory judgment as, indeed, appellants entitled it when brought and as the district court concluded at the trial."

And in *Hargove v. American Cent. Ins. Co.,* C.C.A. Okl. 1942, 125 F. 2d 225, it was said, at page 228:

"If the insured had filed suit on the policies, the asserted remedy would have been legal in its nature and either party would have been entitled to a jury on timely demand as provided by the rules of civil procedure. In this event, the insurors could have asserted the same remedy as a legal or equitable defense to the legal action to recover. Pacific Indemnity Co. v. McDonald, 107 F. 2d 446, 131 A.L.R. 208. The insuror therefore had a plain and adequate remedy at law and the issues tendered were basically legal in their nature, and the case was triable as of right by jury. Enelow v. New York Life Ins. Co., 293 U.S. 379, 55 S.Ct. 310, 79 L.Ed 440. Cf. American Life Ins. Co. v. Stewart, 300 U.S. 203, 57 S.Ct. 377, 81 L.Ed. 605, 111 A.L.R. 1768."

See, also:

Ettelson v. Metropolitan Life Ins. Co., C.C.A. N.J. 1943, 137 F. 2d 62, 65-6.

There can be no doubt under the above cases that defendants Dickinson were entitled to a jury trial as a matter of right and that the jury verdict returned in this case was binding on the trial court. *Prima facie,* therefore, it was palpable error for the trial court to reject the verdict as merely advisory.

The second contention of appellee in answer to the said point is that appellants are estopped from assert-

ing the error. (Bf. App. p. 4.) This contention is bottomed on the claim that appellants misled the court into believing that the verdict was merely advisory by moving for and proposing findings after the jury verdict. The contention is not sound.

The demand for jury trial was timely and unqualified and strictly in accord with Rule 38 (a) of the Federal Rules of Civil Procedure, providing:

> "(b) Demand. Any party may demand a trial by jury of the issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."

No withdrawal of the motion for jury trial was ever made; no motion was ever made by appellee questioning the right of trial by jury; no intimation or finding was ever made by the court that right of trial by jury did not exist; no motion was ever made by appellee for an advisory jury; no intimation was ever made by the court that the jury would be advisory. Addressing itself to such situation, Rule 39 of the Federal Rules of Civil Procedure provides:

> "(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and en-

tered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

"(c) Advisory Jury and Trial by Consent. In all actions not triable by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right."

On the record, it will be obvious to the court that the action went to trial as one in which the defendants Dickinson were *entitled to jury trial as a matter of right.* The record shows that a jury was "empaneled and sworn to try the cause". (T. 115.) The record shows that the jury charge was full and that its form and contents conformed to what is usual in jury trials as of right. (T. 400-418.) The record shows that no objection was made or exception taken to the form of verdict submitted to or returned by the jury respecting the defendants Dickinson. That such form was the usual one in actions by an injured person to recover on a policy of automoible liability insurance is obvious upon inspection of the verdict thus returned. It reads (T. 41):

"We, the Jury in the above entitled action, find in favor of defendants Charles Gromer Dickinson

and Doris May Dickinson, and against the plaintiff General Accident Fire and Life Assurance Corporation, Ltd., a corporation, and on the Cross-Complaint of said Defendants and Cross-Claimants Charles Gromer Dickinson and Doris May Dickinson, as husband and wife, we find in their favor and against the Plaintiff and Cross-Defendant General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, A Corporation, in the sum of Five Thousand Two Hundred and Sixty-One Dollars and Sixty-Five Cents ($5,261.65), with interest thereon at the rate of Seven Per Cent (7%) per annum from December 7, 1940 until paid.

Dated: December 29th, 1941.

Harry A. Armstrong,
Foreman."

The verdict above quoted was obviously binding on the trial court and the record will not permit it to be said that it ever ceased to be binding. It was therefore mandatory upon the court to enter a judgment enforcing the verdict. It would be illogical to say that a verdict ceases to be mandatory and a court is authorized to reject it because request is made to "adopt" it. And it would be equally illogical to say that by requesting a court to "adopt" a mandatory verdict in his favor a litigant estops himself from asserting that the verdict is mandatory.

Actions for declaratory relief are still in that stage where procedural uncertainties exist and where procedural informalities are to be expected. But as indicated by the decision of this court in *Pacific Indem.*

Co. v. McDonald, 107 F. 2d 446, it may not be supposed that reviewing courts will tolerate deprivation of the right of trial by jury because of such uncertainties or informalities.

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2. THE JUDGMENT AGAINST THE DEFENDANTS DICKINSON IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE. (Op. Bf. p. 17.)

Appellants repeat that "if the court is of opinion that the defendants Dickinson were denied the right of trial by jury the arguments under this subdivision will become moot". (Op. Bf. p. 18.)

The brief for appellee is committed to the theory that the law of California required Fereva the insured to give notice to the insurer within 20 days after the accident (Bf. App. pp. 11-15) and that the insurer may escape liability under the policy if Fereva did not give such notice within the 20 days (Bf. App. pp. 29-37).

That, however, is not the law.

Notice of an accident need not be given by the insured; it may be given by the injured person.

Bachman v. Independence Indemnity Co., 112 Cal. App. 465, 470;

Royal Indemnity Co. v. Morris, C.C.A.Cal. 1929, 37 F. 2d 90;

Metropolitan Casualty Ins. Co. of New York v. Colthurst, C.C.A.Cal. 1929, 36 F. 2d 559.

Notice of an accident given to a general agent of the insurer is sufficient even if the general agent does not notify the insurer.

L. F. Dowell Inc. v. United Pacific Casualty Ins. Co., 191 Wash. 666, 72 P. 2d 296;

Cal. Insurance Code, secs. 31, 35.

Failure to give notice within 20 days may be excused.

Burbank v. National Casualty Co., 43 Cal. App. 2d 773, 776-7;

Mercer Casualty Co. v. Lewis, 41 Cal. App. 2d 918, 922.

In the *Burbank* case, it was said, at page 777, in excusing a failure to give notice until three months after the accident:

> "We are satisfied that the finding in respect to the excuse for failure to give any notice of the accident prior to the last mentioned date has ample support in the evidence. The rule in this situation is found in Huddy's Encyclopaedia of Automobile Law, Volumes 13, 14, section 288, at page 358:
>
> 'Under a policy requiring immediate notice to the Insurer of accident insured against, the conditions does not apply to every trivial occurrence, even though it may prove afterward to result in serious injury. If no apparent harm came from the mishap and there was no reasonable ground for believing at the time that bodily injury would follow there is no duty upon the insured to notify the insurer.' "

And in the *Mercer Casualty* case (41 Cal. App. 2d 918) it was said, at page 922:

"Criticism of the judgment is directed to the charges that respondent Lewis failed to comply with the terms of the policy relating to notice of the accident out of which the Collins judgment arose. The point is not available because appellant renounced the policy and denied liability thus waiving any claim that notice of the accident was insufficient or not within time. (Secs. 553, 554, Insurance Code; *Grant v. Sun Indemnity Co.*, 11 Cal. 2d 438, 440.)"

The appellee in the present case is wholly unmindful that the undisputed evidence in the record shows that within 20 days after the accident, the defendants Dickinson gave notice thereof to a general agent of the insurer. The record speaks as follows:

Testimony of Charles Gromer Dickinson.

"Q. I want to ask you, Mr. Dickinson, whether or not you went there to see Mr. L. K. Fereva . . . at his place of business shortly after the 25th day of February, 1940?

A. I did.

Q. * * * About when did you go to see Mr. Fereva at his place of business in Lincoln, Placer County?

A. I went down there sometime between five and twelve days after the accident.

Q. What did you have in Mr. Fereva's garage that caused you to go down there?

A. I had my car.

Q. Had the car been wrecked in the accident?

A. Yes, sir.

Q. When you went down to get the car, as you told the jury, in the period of between five and

twelve days after the 25th day of February, 1940, did you have a conversation with Mr. Fereva?

A. Yes, sir.

Q. Did you have a conversation with him regarding this accident?

A. I did.

Q. Will you please state what the conversation was? * * *

A. Well, *I went down to see Mr. Fereva. I told him my wife was very seriously injured, and asked him what he was going to do about it. He told me that the insurance company had my car tied up there, and was taking care of it, and everything was going to be taken care of.*" (T. 363-364.)

Testimony of Leon Karl Fereva.

"Q. When Mr. Dickinson came in there some week or ten days, or thereabouts, after the 25th of February, 1940, he said he had a conversation with you?

A. Yes, sir.

Q. What did he ask you at that time, and what did you say? * * *

A. He asked me what I intended to do with his car, and the doctor bills in Lincoln. *I told him I had nothing to do with it; it was turned over to the insurance company. Those were practically the words I told Mr. Dickinson.*" (T. 392.)

When it is remembered that Fereva was a general statutory agent of the insurer (T. 184-185) and vested with statutory authority to receive notice of an accident (Ins. Code, secs. 31, 35), the force of the quoted testimony is unmistakable. The notice thus given by the defendants Dickinson to the statutory agent of the

insurer amounted to full compliance with section 551 of the California Insurance Code respecting notice. And the thrust of the quoted testimony is even deeper. The quoted testimony discloses that the insurer through its general statutory agent represented and stated to the defendants Dickinson that the insurer had notice of the accident, that the insurer had notice of the loss, and that the insurer was taking care of the claims of loss. As the insurer set up the agency and conferred the agential authority, it is inevitable that responsibility therefor must rest with the insurer and not with innocent third persons.

It is true, as appellee points out (Bf. App. p. 11), that the law of California has declared that the rights of an injured person are coextensive with the rights of the insured under a policy of automobile liability insurance. But the law so declared does not exhaust all the law applicable to this case. The law so declared does not cover or consider a situation where, as here, the rights of injured persons must be justly determined and the person who occupied the status of insured also occupied the status of a general statutory agent of the insurer. In this respect the present case is apparently one of first impression. The problem here cannot be solved by applying the rule of coextensive rights, for it will be obious to the court that doctrines of waiver and estoppel may be available to injured persons dealing with an agent of the insurer although not available to the insured.

Nor can the problem here be solved by the line of cases cited by appellee (Bf. App. pp. 24-25) involv-

ing only the rights of an insured against an insurer for which he was also agent. As pointed out in the opening brief (pp. 24-25) the solution of the problem here is found in the familiar maxim contained in section 3543 of the Civil Code of California, that "Where one of two innocent persons must suffer by the acts of a third, he, by whose negligence it happened, must be the sufferer".

To strike a balance at this point: 1. The undisputed evidence established that the injured person gave the insurer notice of the accident in strict compliance with section 551 of the California Insurance Code; 2. The undisputed evidence established that any delay in the presentation to the insurer of notice or proof of loss was waived, under section 554 of the same Code, by an act of the insurer; 3. The undisputed evidence established that the insurer was estopped from asserting, as against the injured person, any failure to present or any delay in the presentation of notice or proof of loss.

While it is plain from the law earlier cited that notice of the accident given by the injured person to Fereva the agent was sufficient even if the agent did not relay the notice to his superiors, the record also presents the aspect of prior notice to such superiors given by Fereva the agent and insured. This was discussed at pages 19 to 28 of the opening brief.

The appellee recognizes that a "Twofold obligation rested on Fereva as agent and insured" (Bf. App. p. 15), but its position throughout the brief is that questions of notice, waiver, and estoppel must be decided

on his status as insured and without reference to his status as agent. Appellants do not anticipate that this court will hold that where an insurance company creates such diversity of status it may freely hop back and forth between the branches thereof whenever the pursuit of nonliability is furthered. If, with the approval of his superiors, Fereva as agent gave notice to such superiors at certain times and places and in certain forms, then it is idle for appellee to contend that acts of the insurer did not cause Fereva as insured to give notice in the same way.

As the appellee questions the sufficiency of the evidence to show custom or usage in respect to such notice, the appellants therefore quote from the evidence.

Testimony of Leon Karl Fereva.

"Q. Now, commencing, let us say, in 1934, who did you report any accidents to, or any losses in connection with any policies issued to you or your clients?

A. Mr. Urquhart. * * *

Q. How did you report it to him?

A. Personally; sometimes by phone.

Q. Sometimes by phone and sometimes when he was in your place of business?

A. Yes.

Q. And after you reported any accident or loss to yourself or clients, what did he do?

A. Well, he turned it over to the authorities, I guess.

Q. What happened after that?

A. It was taken care of.

Q. Will you please tell the jury between 1935 and February 25, 1940, how many accidents you had, or your clients had in Lincoln or Placer County, that you reported to Mr. Urquhart?

A. My own personally? * * *

Q. Any of them.

A. Many of them.

Q. How many, Mr. Fereva?

A. A dozen or fifteen, the persons I had insured.

Q. No; just your own, that you carried insurance on, public liability and property damage.

A. You mean my own, personally?

Q. That is right.

A. Well, there have been several of them.

Q. Can you give us the names of any of them? I mean, any persons connected with them?

A. Yes; one of my salesmen, Mr. Smith; a prospective buyer by the name of Mr. Clark; Mrs. Christianson; at one time I had a partner by the name of Gianachi.

Q. *And these instances were accident, were they?*

A. *Yes.*

Q. *How did you report them to Mr. Urquhart?*

A. *Either verbally, or by telephone.*

Q. *After your report, were those accidents disposed of by the plaintiff company?*

A. *Yes, sir.*" (T. 322-323.)

The appellee ascribes significance to the failure of Fereva "to make denial or protest letters reserving company's rights". (Bf. App. p. 37.) If significance exists, it must be confined to the case against defendant Fereva. His failures or omissions in such respect

cannot be imputed to the defendants Dickinson. Moreover, self-serving letters scattered by an insurance company cannot convert a case of liability into one of nonliability. Under the terms of the policy, the insurer was bound to defend "any suit against the insured . . . even if such suit is groundless, false or fraudulent". (T. 124.) Under the law, the insurer was bound to defend the action instituted by the defendants Dickinson against the insured. The insurer, therefore, was bound by the results of that action.

Lamb v. Belt Casualty Co., 3 Cal. App. 2d 624, 630-31.

At page 29 of their opening brief these appellants cited the case of *Norton v. Central Surety & Ins. Co.,* 9 Cal. App. 2d 598, 601, 51 P. 2d 113, as reflecting the California law that the burden rested upon the insurer to prove affirmatively that it was substantially prejudiced by any delay in giving notice of the accident. The case is not mentioned in the brief for appellee. Reliance is there placed upon the case of *Purefoy v. Pacific Auto Indemnity Exchange,* 5 Cal. 2d 81, 53 P. 2d 155, which does not announce a rule contrary to the *Norton* case but merely holds that in the particular case the insurer affirmatively showed such prejudice.

This court will find in the present case that following the entry of judgment in the action instituted by the defendants Dickinson against the insured and the denial of a motion for new trial therein, the insurer wrote a letter to the insured under date of

January 28, 1941, there, for the first time, denying liability under its policy. (T. 171-172.) The letter recites, "This denial is based upon your failure to report the accident promptly and in accordance with the policy provisions". (T. 171.) The denial of liability was not placed upon the ground that the insurer had in any way been handicapped or prejudiced in the defense of the action. It is said in *Grant v. Sun Indemnity Co.,* 11 Cal. 2d 438, at page 440:

> "It is a well-recognized rule, which we conclude is applicable to the special circumstances here, that the insurer may not repudiate the policy, deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for its benefit."

Clearly, the judgment against the defendants Dickinson is not supported by any substantial evidence.

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3. THE CONCLUSIONS OF LAW ARE NOT SUPPORTED BY THE FINDINGS. (Op. Bf. p. 31.)

Under this subdivision in their opening brief, these appellants pointed out that (1) there was no finding that notice of the accident had not been given to the insurer in accordance with law, and (2) there was no finding that the insurer was prejudiced by default, delay, or defect in notice of the accident.

The brief for appellee does not assert the contrary. In earlier parts of this brief discussing the state of the evidence, demonstration was made that the evidence supported findings that notice had been given

in accordance with law and that the insurer was not prejudiced by default, delay, or defect in notice of the accident. The jury verdict for these appellants implied findings to that effect. But even if the matter had not been concluded by the jury verdict, it is apparent that in the absence of findings to the contrary on such issues the conclusions of law herein (T. 92) that plaintiff should have judgment and that defendants should take nothing, are not supported by the findings.

CONCLUSION.

For the several reasons stated in the opening brief and herein supplemented, it is therefore respectfully submitted that the judgment should be reversed.

Dated, Chico, California,
May 1, 1944.

J. Oscar Goldstein,
Burton J. Goldstein,
Attorneys for Appellants Dickinson.